No. 23-329

# In The
# Supreme Court of the United States

CHONG YIM, et al.,

*Petitioners,*

v.

CITY OF SEATTLE,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION AND PROFESSIONAL BACKGROUND SCREENING ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES



OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

## INTEREST OF *AMICI CURIAE*[1]

With the consent of all parties, *amici curiae*, the Consumer Data Industry Association ("CDIA"), and the Professional Background Screening Association ("PBSA") submit this brief in support of petitioners, Chong and Marilyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington (*hereinafter*, collectively "Petitioners").

The Consumer Data Industry Association ("CDIA") is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating

[1] Under Rule 37.6, CDIA and PBSA affirm that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties were notified of CDIA's and PBSA's intention to file its brief of *amici curiae* within the time provided by Supreme Court Rule 37.2. All parties consented to the filing of this brief. The parties' consent emails have been filed with the Clerk of the Court.

competition, expanding consumers' access to financial and other products suited to their unique needs.

PBSA is an international trade association of over 900 member companies that provide employment and tenant background screening and related services to virtually every industry around the globe. The tenant screening reports prepared by PBSA's background screening members are used by landlords and property managers every day to ensure that residential communities are safe for all who work, reside, or visit there. PBSA members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data.

The tenant screening reports that *amici's* members provide are consumer reports governed by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). The information at issue in this case includes public criminal history information that property managers rely on to prioritize the safety of their employees, residents, and guests. Seattle Mun. Code § 14.09 *et seq.*, passed by the City of Seattle ("City"), (the "Ordinance"), improperly restricts the lawful use of tenant screening reports that include criminal record information for most housing providers in Seattle.

The U.S. Court of Appeals for the Ninth Circuit has held that landlords have a First Amendment right to obtain information prohibited by the Ordinance but that the right does not extend to allow them to use that information. The Court of Appeals' decision has

created confusion over how tenant applications may be reviewed, and is causing harm to property owners and CRAs alike. *Amici* file this brief to bring the broader implications of the Court of Appeals' decision to the Court's attention.

## SUMMARY OF ARGUMENT

Tenant screening providers serve an important public interest by facilitating access to information so housing providers may provide what tenants demand and the law often requires: safe places to live. Tenant screening reports provide important information that housing providers use to fulfill their duty to provide safe housing for their tenants and their guests, as well as safe workplaces for their employees. Passed in 2017, the Ordinance generally prohibits the majority of landlords from (1) inquiring about arrest records, conviction records, or criminal histories on current or prospective tenants (the "inquiry provision"); and (2) taking adverse action against them, i.e., declining an application, based upon that information (the "adverse action provision").[2] Petitioners sued the City, challenging the inquiry provision as an unconstitutional infringement on their First Amendment rights, and the adverse action provision as an unconstitutional infringement on their Substantive Due Process right to exclude others from their property.

[2] Seattle Mun. Code § 14.09.025(A)(2).

The Ninth Circuit held that the Ordinance violated Petitioners' First Amendment rights to ask applicants about and obtain information regarding the applicant's criminal history, but that, at the same time, the Ordinance did not violate property owners' Substantive Due Process rights, and thus property owners can be prohibited from using the resulting criminal history information as a basis for taking adverse action against the applicant.[3] In practice, the decision is inherently inconsistent. If one has a right to obtain information, and consider it, but cannot actually make use of it, that is in practical effect the same as restricting the inquiry itself. Moreover, the Ninth Circuit's inconsistent view of the rights inherent with respect to control over and access to one's property – which necessarily includes the right to exclude others from one's property – is a fundamental constitutional right, notwithstanding the legal theory of relief pursued therefore. This Court should grant the Petition to clarify the legal rights held by property owners and resolve the inherent conundrum created by the opinion below.

## ARGUMENT

This Court should grant certiorari to clarify that in order for property owners to exercise their fundamental constitutional right to exclude others from their property, they must be able to use the

[3] *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023).

information they already have an acknowledged First Amendment right to obtain.

## I. *Amici's* Members Provide Information Critical to the Exercise of Petitioners' Fundamental Property Rights.

Tenant screening providers serve an important public interest by offering what tenants demand and the law often requires: safe places to live. Tenant screening reports assist housing providers in fulfilling their duty to provide safe housing for their tenants and their guests, as well as safe workplaces for their employees.

*Amici's* members provide residential screening reports pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*[4] Their housing provider clients typically receive three different kinds of race-neutral information about prospective tenants: (1) financial information, including a credit score, credit report, income verification and rent payment history;[5] (2) eviction information, consisting of

[4] In general terms, the FCRA regulates consumer information and sets the terms under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and consumer reporting agency, respectively). *See gen.* ABA Section of Antitrust Law, *Consumer Law Developments* 117-119 (2009) (summarizing function and scope of FCRA).

[5] Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* S1-S2 (2007) (noting that credit scores act as predictors of default and not as proxies for race).

unlawful detainer records; and (3) criminal background information reporting on cases that involve harm to persons and property. Each of these categories provides the housing provider with reliable predictors regarding the tenant's suitability for a particular property. For example, individuals who have not skipped or been late in rent payments have a roughly six percent rate of default; prospects with a rental debt default at a rate of nearly one in four.[6] Owners looking to maintain viable properties properly seek to avoid these costs, and the services provided by *Amici's* members help them do so.

Residential screening advances public safety, including the safety of other residents of the property and their guests.[7] The responsible use of tenant screening advances all of these interests: economic stability, protection from identity theft, and general public safety. Indeed, some evidence exists that the use of a

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[6] *See* Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013), http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf.

[7] *See*, *e.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-135 (2002) (affirming the ability of public housing authorities to have no-fault evictions to protect health and safety interests); *see also* Preventing Crime in Federally Assisted Housing – Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq*. (2013) (defining times when public housing authorities may or must terminate tenants involved in particular types of criminal activity); *NASA v. Nelson*, 131 S.Ct. 746, 758 (2011) (acknowledging the legitimate needs of the government as employer to screen employees for drug use and other elements of their background).

background screening report may actually *reduce* the incidence of racial discrimination by shattering subconscious stereotypes.[8]

Criminal record data can be used to estimate the potential risk of future criminal activity, and in *Amici's* experience, housing providers do not treat all offenses equally. In particular, housing providers are rightfully more concerned about the presence of violent offenses in a criminal history as opposed to nonviolent – and less severe – crimes. Moreover, the length of time since the offense occurred is a relevant factor that is considered by landlords. The purpose for consideration of this information is the risk of harm created by someone likely to re-offend. A study released by the federal Bureau of Statistics of the U.S. Department of Justice in July of 2021 substantiates the concern regarding violent offenders, finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years.[9] "Violent offenses" were defined to include homicide, rape or sexual assault, robbery, assault, and other miscellaneous or unspecified violent offenses.[10]

Sadly, tragic consequences can result when criminal record information is not utilized in tenant

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[8] *See* Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451, 452 (2006).

[9] *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012-2017)*, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf p. 12.

[10] *Id.* at 24.

screening. For example, in 2016, a Nebraska tenant's minor child was kidnapped and raped by another resident who had been allowed to move into a rental community without first undergoing a background check.[11] Another child was raped and murdered in 2017 by a resident in an apartment community who had a history of violent offenses but was allegedly permitted into the community without undergoing a background check.[12] Tenant screening reports help property managers and housing providers do what they can to protect their residents.

## II. The Ninth Circuit Erred in Holding Petitioners Have a Right to Obtain Criminal Record Information but Not Use It.

The Ninth Circuit held that property managers and housing providers can ask applicants about criminal history but cannot use that information as a basis for taking adverse action against the applicant. But banning one is in practical effect the same as banning the other. It would be almost impossible for a property owner to receive information about an applicant but not use it, and allowing this internally inconsistent

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[11] *Cure v. Pedcor Mgmt. Corp.*, 265 F. Supp. 3d 984, 988-989 (D. Neb. 2016) (denying motion to dismiss because plaintiff alleged sufficient facts to argue that if the housing provider had conducted a background check, it would have discovered that the perpetrator had multiple convictions for assault and public indecency).

[12] https://abc7chicago.com/tiffany-thrasher-rape-murder-schaumburg/2267952/.

holding to stand would open a flood of litigation against property owners simply over whether they used information they have a legal right to receive.

### A. The Ninth Circuit's Split Decision

The Ordinance prohibits property owners from (1) inquiring about arrest records, conviction records, or criminal histories of current or prospective tenants (the "inquiry provision"); and (2) taking adverse action against them based on that information (the "adverse action provision").[13] There are four exceptions to these restrictions. First, landlords may inquire about criminal record information related to an applicant's sex offender status.[14] Second, the adverse action provision does not apply to landlords of federally assisted housing that may have requirements for the denial of tenancy.[15] Third, it does not apply to leasing a single-family dwelling in which the owner lives.[16] Fourth, it does not apply to leasing a detached accessory dwelling unit of a single-family home in which the owner lives.[17]

The Ninth Circuit held that the inquiry provision – a complete ban on any discussion of criminal history between the landlords and prospective tenants or any search by a landlord regarding an applicant – was "not in proportion to the interest served by the Ordinance"

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[13] Seattle Mun. Code § 14.09.025(A)(2).

[14] Seattle Mun. Code § 14.09.115.

[15] *Id.*

[16] *Id.*

[17] *Id.*

of reducing racial injustice and reducing barriers to housing and therefore violated the First Amendment.[18] The panel cited to various other jurisdictions' inquiries into – and use of – criminal history information with approval as less intrusive means of achieving the same stated interests.[19] The court identified two frameworks of regulation used in other jurisdictions that it found reasonable and served the stated interest.

The first framework, referred to as a 'bifurcated' screening process, is one where property owners must first conduct a preliminary screening to determine an applicant's conditional eligibility without considering any criminal history information. If the applicant is conditionally approved, the property owner may then review and consider criminal history information. Often the applicant is permitted to provide mitigating evidence to respond to any identified charges.[20] In the second, property owners may choose between whether to consider an applicant's full criminal history information and prepare a written evaluation of the applicant and

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[18] *Yim v. City of Seattle*, 63 F.4th 783, 786-787 (9th Cir. 2023).The panel did not decide whether the Ordinance regulates commercial speech and calls for the application of intermediate scrutiny, or whether the Ordinance regulates non-commercial speech and is subject to strict scrutiny review, because it concluded that the Ordinance did not survive even the intermediate scrutiny standard of review.

[19] *Id*. at 797.

[20] *Id.* citing to Cook County, Illinois (Cook County, Ill. Code § 42-38); San Francisco, California (S.F., Cal., Admin. Code §§ 87.1–.11); Washington D.C. (D.C. Code §§ 42-3541.01–.09); Detroit, Michigan (Detroit, Mich., City Code § 26-5-1); and the State of New Jersey (N.J. Admin. Code §§ 13:5-1.1–2.7.).

providing any rejection in writing, or they may opt to consider a limited set of offenses (including 7 years' worth of felony offenses) without additional requirements.[21] Each regulatory framework permits the property owner to take action based on the information received – to make use of it, and not only receive it.

Citing these frameworks with approval – and seemingly as justification for the proposition that less restrictive laws could accomplish the same policy goals – the Ninth Circuit explained "these ordinances would permit the landlords to ask a potential tenant about their most recent, serious offenses, which is the information a landlord would be most interested in." *Id*. The court recognized that, "[as] with credit checks, as soon as the technology existed, landlords insisted on using it to screen tenants because they were concerned about tenants with a criminal history."[22] The court said "[b]ecause a number of other jurisdictions have adopted legislation that would appear to meet Seattle's housing goals, but is significantly less burdensome on speech, we conclude that the inquiry provision at issue here is not narrowly tailored" and unconstitutional.[23]

Yet, the panel also held that the adverse action provision was not an unconstitutional infringement of the property owners' Substantive Due Process rights

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[21] *Id.* citing to Portland, Oregon (Portland, Or., City Code § 30.01.0860, and Minneapolis, Minnesota (Minneapolis, Minn., City Code § 244.2030).

[22] *Id.* at 798.

[23] *Id.* at 798.

to exclude others from their property.[24] The Ninth Circuit concluded that the right to exclude someone from their property was not a fundamental right in the context of a Substantive Due Process claim, even though it acknowledged that a fundamental right has been acknowledged by this Court's takings jurisprudence. As a result, the court examined the provision under rational basis scrutiny, summarily found that the prohibition against denying someone housing would further the City's stated goals, and held the prohibition permissible.

The result of the ruling below is that, while property owners can ask applicants about criminal history, they cannot use the resulting criminal history information as a basis for declining the applicant. This error leaves open the question of whether, if one has a right to obtain the information, and consider it, but cannot actually use it, that restriction against use is in practical effect tantamount to a restriction against the inquiry itself. The practical answer is yes.

"[I]n the free speech context, '[a] chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity.' "[25] The right to receive and make use information is "an inherent corollary of

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[24] *Id*. at 798.

[25] *The Establishment Clause and the Chilling Effect,* 133 Harv. L. Rev. 1338 (Feb. 2020).

the rights of free speech and press. . . ."[26] As this Court explained in *Sorrell v. IMS Health Inc.*, "the right to speak is implicated when information [one] possess is subjected to restrains on the way in which the information might be *used* or disseminated."[27] The First Amendment therefore clearly protects the communication of information both by the speaker and as received by the listener, as well as the use of such information.

It should be expected that the Ordinance's restriction against the use of the criminal history information will have an impermissible "chilling effect" on the landlord's First Amendment rights. That is because the Ordinance as a whole is so unclear as to the property owner's rights and responsibilities under the law, he is unable to act in accordance with it. Where a statute is so vague and fails to adequately advise the citizen of their rights and responsibilities under the law, the statute may fail for vagueness under a Fourteenth Amendment challenge because of the risk that it will have a chilling effect on citizen's lawful exercise

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[26] *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: 'The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.) *quoting Martin v. Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965).").

[27] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2021) (emphasis added) (*quoting Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 32 (1984).

of their rights.[28] As the Supreme Court explained "[t]he dividing line [within the challenged law] between what is lawful and unlawful cannot be left to conjecture."[29]

The inquiry and adverse action provisions of the Ordinance are inexorably intertwined and do not operate in a vacuum. If the decision is allowed to stand, even a landlord attempting to comply with the Ordinance would never be able to deny an applicant on whom it pulled a tenant screening report for fear of being accused of violating the law. Perhaps without recognizing the result of its own decision, the Ninth Circuit recognized some of the potentially harmful results that are likely to follow " . . . if landlords are allowed to access criminal history, just not act on it, it makes the Ordinance extremely difficult to enforce, and makes it more likely that unconscious bias will impact the leasing process."[30]

The other unintended consequence of this fractured ruling is to force landlords into an impossible conundrum that places them directly in the line of fire

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[28] *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926). In *Connally,* a wage law was struck down for vagueness where the targeted actor could not reasonably determine what the law required of them. *Id.* In particular, the law required the company to pay a "current rate of wages" of the relevant "locality." *Id.* This left employers attempting to ascertain what was appropriate over varying time periods, dependent on the nature of work done, and which locality was to be used as the benchmark. *Id.* at 393-394. As such, the law, which not only provided for fines but also imprisonment, was infirm under the Fourteenth Amendment.

[29] *Id.* at 393.

[30] *Id.* at 796, fn. 15.

for alleged violations of law because they received the information they have a legal right to receive, but may not use for the very purpose intended. The resulting flood of litigation over these practices and the Ordinance would overrun the courts, and still not solve the City's stated concerns.

### B. The Right to Exclude Is a Fundamental Right to Which Strict Scrutiny Applies.

As Petitioners have articulated, the right to exclude is clearly a "fundamental right" of private property owners.[31] In order to exercise that right, property owners must be free to consider the information the Ninth Circuit held that the First Amendment already allows *Amici's* members to share with them. The Ninth Circuit's analysis is flawed in that it treats the property owner as having different rights depending upon the nature of the relief sought, when in truth the owner's rights are inherent and unchanging – regardless of the legal theory of relief pursued for violations thereof.

Congress has recognized the rights of property owners, and the government that makes housing available through those owners, to exclude prospective tenants who create unreasonable degrees of risk from their properties. A property owner has the legal right, recognized since the birth of this country, to be secure in his person, and to be undisturbed in the possession of his property, of which the right to exclude unwanted

[31] *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972).

persons from their property is a part.[32] "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[33] Under the Fifth[34] and Fourteenth Amendments,[35] property owners have the right to be free from government action that interferes with those rights.[36] Where the government interferes, property owners may have various remedies to obtain relief – by proceeding under a takings claim or a substantive due process claim. But the *form* of the relief does not change the fundamental *nature* of the inherent right, which include the rights "to possess, use and dispose" of the property.[37] As the Supreme Court in *Loretto* said, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."[38] Such is the special kind of injury property owners face under the Ordinance where they may not decline tenancy to someone they have learned poses a real threat.

Notably, Congress has not only recognized this fundamental right of a housing provider to use criminal history information in evaluating potential tenants

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[32] *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2170 (2019).

[33] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-436 (1982).

[34] U.S. Const. amend. V.

[35] U.S. Const. amend. XIV.

[36] U.S. Const. Art. V ("no person shall be . . . deprived of life, liberty, or property, without due process of law").

[37] *Loretto*, 458 U.S. at 435-436.

[38] *Id.*

of public housing units – it has legislated it for itself. Just as private housing providers have a duty of care to their tenants, Congress has declared that even "the Federal Government has a duty to provide public and other federally assisted housing that is decent, safe, and free from illegal drugs. . . ."[39] In fact, Congress enumerated four discrete categories of applicants with criminal histories that public housing authorities must reject: (1) persons subject to a lifetime registration requirement under state sex offender laws; (2) persons convicted of methamphetamine production on public housing property; (3) persons evicted from public housing for drug-related criminal activity in the three years prior to the application, unless the evicted individual completed an approved rehabilitation program; and (4) persons currently engaged in illegal drug use.[40]

Beyond these mandatory bans, public housing authorities have discretion to develop more stringent screening policies and to accept or deny prospective renters with records of other crimes. Federal guidelines further instruct that public housing authorities may reject applicants who have engaged in any of the following activities within a reasonable time before submitting their application: drug-related criminal activity, violent criminal activity, and other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other

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[39] 42 U.S.C. § 11901(1).

[40] 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661; 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

residents, the owner, or public housing-agency employees.[41] As Congress explained in its findings, "the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures."[42] Residents of private housing accommodations, and the providers of such private housing, are entitled to no less protection that those of public accommodations.

### C. The Ordinance is Not Narrowly Tailored to Its Purposes and Fails Under Any Heightened Scrutiny.

Had the Ninth Circuit properly recognized the fundamental right inherent in the landlords' "bundle of sticks," the court would have been required to evaluate the Substantive Due Process claim under a heightened scrutiny level of review.[43] The Ordinance's adverse action provision would fail under any heightened level of scrutiny. The City's goals in adopting the Ordinance were: using racial equity, keeping families together, building inclusive communities, and addressing homelessness.[44] While these may be laudable goals, the Ordinance is not actually crafted to achieve them. The Ordinance prohibits outright the use of

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[41] 42 U.S.C. § 13661(c).

[42] 42 U.S.C. § 11901(4).

[43] *Reed v. Town of Gilbert*, 576 U.S. 155, 184 (2015).

[44] *Yim*, 63 F.4th at 789.

relevant, publicly available information by only a certain class of people, while allowing other (more favored) persons – enumerated in the exemptions to the law in Seattle Mun. Code § 14.09.115 – to use the same information to take the same action with regard to applications. In explaining, perhaps, the basis for distinguishing between classes of housing providers, the City found "except for landlords operating federally assisted housing programs, conducting a criminal background check to screen tenants is a *discretionary choice* for landlords that they have no legal duty under City or state law to fulfill."[45] This assertion presumes that (a) housing providers have no duty to ensure the safety of their residents, and (b) because such housing providers have a "choice" whether to use criminal record information, the City can simply take that choice away from them with no consequences.

Property managers owe a duty of care to their residents to protect them from harm that is reasonably foreseeable.[46] Because housing providers may even be subject to criminal liability for certain offenses committed by their tenants,[47] the Washington Supreme Court has stated "[i]t would seem only reasonable that the housing provider should at the same time enjoy the

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[45] *Id.* (emphasis added).

[46] *See*, *e.g.*, *Peterson v. Kings Gate Partners-Omaha I, L.P.*, 290 Neb. 658 (2015); *Griffin v. W. RS, Inc.*, 97 Wash. App. 557, 570, 984 P.2d 1070 (1999), *rev'd on other grounds by* 143 Wash.2d 81, 13 P.3d 558 (2001); *see also Hutchins v. 1001 Fourth Avenue Associates*, 116 Wash.2d 217, 224, 802 P.2d 1360 (1991).

[47] *See State v. Sigman*, 118 Wash.2d 442, 447, 826 P.2d 144 (1992).

right to exclude persons who may foreseeably cause such injury."[48]

Moreover, housing providers in Washington State are required to keep properties "fit for human habitation,"[49] and courts have held that the warranty of habitability includes a duty to take reasonable security measures against foreseeable crime.[50] Criminal background checks are a necessary part of ensuring the safety of residents, as has been borne out in the experience of Washington housing providers following the adoption of this Ordinance.

Residents of at least one Seattle property have experienced skyrocketing crime rates, forcing some long-term residents to vacate the property entirely, all of which occurred – pre-COVID – during a two-year period in which violent crime rates remained stable nationwide.[51] In the two years following the Ordinance's passage in February of 2018, one property experienced the following consequences:

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[48] *City of Bremerton v. Widell*, 146 Wash.2d 561, 572, 51 P.3d 733 (2002).

[49] RCW 59.18.060.

[50] *See* Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 Vanderbilt Law Review 431, 442-444 (1985), *available at*: https://scholarship.law.vanderbilt.edu/vlr/vol38/iss2/3.

[51] *See*, *e.g.*, Federal Bureau of Investigation *UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES* (2019), *available at*: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/violent-crime. *See also*, *id*., Tables 1 and 1A, *available at*: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1.

- calls to 911 from the building have more than doubled, fire alarms are set off randomly during the night, employees have been assaulted, residents have sold drugs from their units, there was a stabbing, and the hallways are littered with feces, trash, and used needles;
- longtime residents are moving out, the number of evictions have increased substantially (up from 1.48 to 3.96 per month – an increase of 168 percent), employee turnover is 400 percent, . . . and employees now work in teams because they are afraid to work alone; and
- the property owner has had to adopt additional security measures to protect residents of the property, including installing controlled access systems, limiting resident access to their floors, and hiring armed security guards.[52]

To the contrary, *Amici* are aware of no study, report, or finding that demonstrates that the Ordinance has had a positive impact on the City's tenant population or made material progress towards any of the stated goals.

In fact, one year after its adoption, the City's Auditor conducted a survey of the experiences of renters and housing providers operating in the City as well as the distribution, condition, cost, and change in rental housing from August 2017-April 2018.[53] The report

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[52] Brief of Amicus Curiae GRE Downtowner LLC, *Yim v. Seattle*, No. 2:18-cv-736-JCC, Dkt. No. 16 (W.D. Wash. filed Nov. 5, 2021), pp. 6-9.

[53] *Results of Seattle Rental Housing Study required by ordinances 125114, 125222* (July 20, 2018), found at https://www.seattle.

found, among other facts: (i) that the availability of housing, especially affordable housing, across the City was declining; (ii) that roughly 40 percent of housing providers have sold, or plan to sell, property in response to City ordinances governing the housing market; (iii) about three-fourths of the respondents agree or strongly agree with the idea that the Ordinance would jeopardize the safety of other residents in the property (with those operating moderate to larger properties affirming this sentiment more often); and (iv) there was "a strong consensus" among housing providers that the process of adopting the Ordinance "largely ignored housing providers' perspectives, resulting in a set of ordinances perceived by landlords as highly burdensome and ineffective."[54]

The problems articulated by the City are not new, and there are less intrusive means the City could have used to achieve their stated goals, including the two frameworks discussed above. For example, the Department of Housing and Urban Development ("HUD") has demonstrated that it is possible to balance the risk for potentially discriminatory conduct against the need that housing providers have to protect their residents and employees. In 2013, HUD released its guidance relating to the use of criminal record information in tenant screening.[55] In its Guidance, HUD explained the

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gov/Documents/Departments/CityAuditor/auditreports/UWSRHSFinal.pdf.

[54] *Id.* at p. 26.

[55] U.S. Dept. of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Standards*

potential for disparate treatment and disparate impact on minorities resulting from housing eligibility decisions that relied on criminal record history information, where the policy or practice lacked a legally sufficient justification. But HUD did not adopt a blanket ban on the use of criminal record information in housing decisions.[56] Instead, the Guidance requires housing providers to engage in an individualized assessment of the applicant, including information related to the criminal history, and requires them to adopt non-discriminatory policies regarding the use of criminal record information in screening that considers the nature, recency, and severity of the crime.[57] This approach allows housing providers to use this vital information to manage risk but at the same time, protect those who may be victims of its misuse. And with respect to reducing homelessness, the City could certainly provide public housing itself.

Instead, the City has chosen to abdicate its responsibility to address a public problem by placing the burden on property owners (and their tenants) by prohibiting the use of information about their safety

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*to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), *available at*: https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF ("Guidance").

[56] The Guidance expressly noted that Section 807(b)(4) of the Fair Housing Act "does not prohibit conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)."

[57] *See gen. id.* at 6-7.

which the Ninth Circuit has held they have a right to obtain under the First Amendment. By ignoring the duties that Petitioners owe to existing tenants and employees of the properties, and the clear rights that property owners inherently have in such housing, the Ninth Circuit erred.

## CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari to make clear that an individual's right to control their property is fundamental, and that review of action by the government that infringes upon, or eliminates, such right is subject to heightened scrutiny.

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Respectfully submitted,

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